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IN THE COURT OF APPEALS OF INDIANA

TIMOTHY NEWBY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0603-CR-225
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pflegging, Judge
Cause No. 29D02-9106-CF-33

May 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Timothy Newby appeals his sentence for child molesting as a class A felony[1] and child molesting as a class B felony.[2] Newby raises five issues, which we revise and restate as:

I. Whether Newby's sentence violates Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied; and,

II. Whether the trial court abused its discretion in sentencing him.

On cross appeal, the State argues that the trial court erred by granting Newby's motion for a belated appeal. We reverse.

The relevant facts follow. In June 1991, the State charged Newby with multiple counts of child molesting and one count of confinement after he abducted and molested a four-year-old girl and molested another four-year-old girl. Newby pleaded guilty to one count of child molesting as a class A felony and one count of child molesting as a class B felony. At the guilty plea hearing, the trial court informed Newby that, by pleading guilty, he was giving up his right to appeal his "conviction." Transcript at 8. The trial court imposed a fifty-year sentence on the class A felony conviction and a twenty-year sentence on the class B felony conviction. The trial court ordered that the sentences be served consecutively, suspended ten years of the sentence, and ordered five years of probation.

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[1] Ind. Code § 35-42-4-3 (1991).

[2] Ind. Code § 35-42-4-3 (1991).

In 1994, Newby filed a motion to correct erroneous sentence in which he argued that his consecutive sentences were improper. The trial court denied his motion.

In March 2005, Newby filed a petition for post-conviction relief in which he argued that his guilty plea was unknowing and unintelligent. The public defender later moved to withdraw the petition for post-conviction relief so that counsel could be appointed to pursue a belated appeal. On June 9, 2005, the trial court granted the motion to withdraw the petition for post-conviction relief and appointed counsel "to investigate and pursue permission to file a belated Notice of Appeal, a belated Motion to Correct Error, or Appeal, pursuant to P-C.R. 2, and if granted, a direct appeal." Appellant's Appendix at 321.

On January 25, 2006, Newby apparently filed a motion for leave to file a belated notice of appeal and a belated notice of appeal. After briefing commenced on this appeal, it was discovered that no record existed of the motion for leave to file the belated notice of appeal being granted. This court remanded to the trial court to allow Newby to file a new motion for leave to file a belated appeal. On September 20, 2006, Newby filed a motion for leave to file a belated appeal, which alleged:

> 1. Defendant plead guilty on September 27, 1991 and was sentenced on November 15, 1991. Appellent [sic] counsel was appointed on or about June 9, 2005.
> 2. Defendant has never filed an appeal in this cause of action and filed this belated notice of appeal as a result of a change in Indiana's sentencing laws.
> 3. The failure to file a timely notice of appeal was through no fault of the Defendant or his appointed counsel. The belated appeal is as a result of a change in Indiana's sentencing laws. Since the change in laws, Defendant has been diligent in seeking to have pauper counsel

> appointed and his appeal perfected. Moreover, after reviewing the record, it is apparent that there were several errors made by the trial court in handing down defendant's sentence.
>
> 4. Defendant's counsel would advice [sic] the court that a belated notice of appeal and an appellate brief were already filed on behalf of the Defendant. This Motion for Leave To File Belated Appeal is being filed now because the original motion was either not filed or was misplaced. The appeal filed under Cause No. 29A02-0603-CR-225 is on remand from the Indiana Court of Appeals until the issue of this motion is resolved.

Appellee's Appendix at 1-2. On September 25, 2006, the trial court entered an order granting Newby's motion for a belated appeal. The order provided: "[T]he Court having read and examined said motion, and having held a hearing on the issues presented, now finds that the same should and hereby is granted." Id. at 3. However, there is no indication in the record provided to us and the parties do not contend that a hearing on Newby's motion was held.

We first address the State's argument that the trial court abused its discretion by granting Newby's motion for a belated appeal because, if it has merit, it would be dispositive of Newby's claims. Generally, the decision of whether to grant or deny a petition for permission to file a belated notice of appeal is a matter within the discretion of the trial court. Bailey v. State, 440 N.E.2d 1130, 1131 (Ind. 1982); Land v. State, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), reh'g denied, trans. denied. "Although we acknowledge that the trial court is generally in a better position to weigh evidence and judge witness credibility and we defer to that discretion, such is not always the case." Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). In Baysinger, we explained that where a trial court does not hold a hearing on a defendant's petition for

permission to file a belated notice of appeal, we will conduct a de novo review of the trial court's decision on the petition. Id. Here, Newby filed his petition for permission to file a belated notice of appeal on September 20, 2006, and the trial court granted it on September 25, 2006. Although the trial court's order indicates that a hearing was held, we have no indication in the record and the parties do not contend that a hearing was held. Therefore, we will review the trial court's grant of the petition de novo. See id.

Ind. Post-Conviction Rule 2 permits a defendant to seek permission to file a belated notice of appeal and provides:

> Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:
>
> (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
>
> (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.
>
> The trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file a belated notice of appeal shall be conducted according to Section 5, Rule P.C. 1.
>
> If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.
>
> If the trial court finds no grounds for permitting the filing of a belated notice of appeal, the defendant may appeal such denial by filing a notice of appeal within thirty (30) days of said denial.

Thus, Newby was required to show that his failure to file a timely notice of appeal was not his fault and that he had been diligent in requesting permission to file a belated notice of appeal.

The State argues in its cross appeal that Newby was not diligent in requesting permission to file a belated notice of appeal. A defendant seeking permission to file a belated notice of appeal has the burden of proving his grounds for relief by a preponderance of the evidence. Beaudry v. State, 763 N.E.2d 487, 489-490 (Ind. Ct. App. 2002); Land, 640 N.E.2d at 108. There are no set standards defining delay or diligence; each case must be decided on its own facts. Land, 640 N.E.2d at 108 (citing Bailey, 440 N.E.2d at 1131). Factors affecting the determination include the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay. Id.

Newby's motion alleged: "The belated appeal is as a result of a change in Indiana's sentencing laws. Since the change in laws, Defendant has been diligent in seeking to have pauper counsel appointed and his appeal perfected." Appellee's Appendix at 1. The State presumes that the change in Indiana's sentencing law Newby is referring to is a result of Blakely. The State contends that "[a] defendant may not sit on his rights for years until a favorable appellate decision is handed down and then claim to be diligent in pursuing his rights so that he can take advantage of that favorable decision." Appellee's Brief at 11. Rather, the State argues that the diligence that must be

shown is "diligence in seeking to appeal the sentence at all, not diligence in seeking to benefit from a change in the law." Id. at 12. In his reply brief, Newby concedes that Blakely and the application of Blakely to Indiana's sentencing scheme in Smylie v. State, 823 N.E.2d 679 (Ind. 2005), cert. denied, 126 U.S. 545 (2005), is the change that prompted him to seek an appeal of his sentence through the belated appeal process.

In Collins v. State, 817 N.E.2d 230, 233 (Ind. 2004), the Indiana Supreme Court clarified that when a defendant pleads guilty in an open plea agreement, he must challenge any sentence imposed on direct appeal, and not by way of a petition for post-conviction relief. Following Collins, many defendants have sought to file belated appeals based upon this clarification. For example, in Baysinger, 835 N.E.2d at 226, we held that the defendant was entitled to file a belated notice of appeal. There, the trial court had not informed the defendant of his right to appeal his sentence after his guilty plea. 835 N.E.2d at 225-226. The defendant's affidavit indicated that he "only learned of his right to challenge his sentence after he read Collins." Id. at 226. The defendant filed his motion for belated appeal shortly after Collins was handed down. Id. We concluded that "upon learning of the proper method for challenging his sentence, Baysinger diligently sought permission to file a belated notice of appeal." Id.; see also Cruite v. State, 853 N.E.2d 487, (Ind. Ct. App. 2006) (holding that the trial court abused its discretion by denying the defendant's request for a belated appeal where he sought a belated appeal shortly after Collins and the trial court had failed to inform him of his right to appeal his sentence after his guilty plea), trans. denied.

Unlike the defendants in Baysinger and Cruite, Newby does not allege that he was unaware of his ability to initiate a direct appeal during the almost fifteen years between his guilty plea and his motion for belated appeal. Rather, Newby simply alleges that he was unaware of this particular basis for appeal until the change in Indiana's sentencing laws. We agree with the State that Newby was required to show diligence in pursuing an appeal of his sentence in general, not diligence in pursuing an appeal following a favorable change in the law. We conclude that Baysinger and Cruite are distinguishable from this situation, and Newby failed to show that he had been diligent in requesting permission to file a belated notice of appeal.[3] Based upon the evidence presented in the record, the trial court erred by granting Newby's motion for belated appeal. See, e.g., Dobeski v. State, 275 Ind. 662, 665, 419 N.E.2d 753, 756 (Ind. 1981) (holding that the testimony of petitioner and his mother that they had continued to contact various private attorneys in unsuccessful attempts to appeal during the fourteen-year period between his conviction and attempted appeal was not sufficient evidence to meet petitioner's burden of showing diligence); see also Mathews v. State, 849 N.E.2d 578, 589 (Ind. 2006) ("The sentence was imposed in 1994, long before Blakely v. Washington, 542 U.S. 296, 124 S.

[3] In support of his argument that the trial court correctly granted his motion for belated appeal, Newby relies upon Sullivan v. State, 836 N.E.2d 1031 (Ind. Ct. App. 2006), and Boyle v. State, 851 N.E.2d 996 (Ind. Ct. App. 2006). However, both cases are distinguishable. In Sullivan, the defendant was granted permission to file a belated appeal, and the State did not cross appeal that determination. 836 N.E.2d at 1034-1035. Thus, we did not address whether the defendant was correctly granted a belated appeal. In Boyle, the defendant sought a belated appeal based upon the clarification in Collins. 851 N.E.2d at 1004-1005. Here, Newby does not argue that he sought a belated appeal based upon the clarification in Collins.

Ct. 2531, 159 L.Ed.2d 403 (2004) and Smylie v. State, 823 N.E.2d 679 (Ind. 2005) and is not subject to those cases.").

For the foregoing reasons, we reverse the trial court's grant of Newby's motion for belated appeal.

Reversed.

CRONE, J. concurs

SULLIVAN, J. dissents with separate opinion

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	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

SULLIVAN, Judge, dissenting

In Collins v. State, 817 N.E.2d 230, 232 (Ind. 2004), the Court notes that post-conviction relief is available for raising issues not known or not available at trial. Blakely became the law after Newby's trial and thus was not known or available at the

time judgment was entered. Thus Ind. Post-Conviction Rule 2 was the only recourse to raise the issue.

The issue than becomes whether Blakely is to be retroactively applied in a belated appeal which is considered timely for all purposes. P.C.R. 2(1).

Collins relies upon Taylor v. State, 780 N.E.2d 430 (Ind. Ct. App. 2002) trans. denied, but in Taylor, the sentencing issue was available for immediate direct appeal but was not raised, i.e. no direct appeal was taken. Here, the sentencing issue was not available for appeal until after the period for filing a notice of appeal pursuant to Ind. Appellate Rule 9 had expired.

The trial court's advisement here, that by pleading guilty Newby was giving up his right to appeal his "conviction," was susceptible to a reasonable interpretation that he could not appeal at all. He was not advised of his right to appeal the sentence. In my view this case is similar enough to Baysinger v. State, 835 N.E.2d 223 (Ind. Ct. App. 2005) and Cruite v. State, 853 N.E.2d 487 (Ind. Ct. App. 2006), trans. denied, to warrant the lower court's granting of Newby's petition to file a belated appeal.

With regard to the contention that Newby was required to demonstrate that he was not responsible for the delay in seeking an appeal within the thirty-day period established by Appellate Rule 9, and that he exercised diligence in pursuing the belated appeal, it should be noted that no hearing was conducted in this matter. Accordingly, he was not afforded an opportunity to show by evidence that he was not at fault and exercised diligence. Nevertheless, he did allege in his petition that he was not at fault and that he

exercised diligence in seeking a belated appeal once he became aware that he had grounds for such an appeal.

It is the State's position, agreed to by the majority here, that Newby was "required to show diligence in pursuing an appeal of his sentence in general, not diligence in pursuing an appeal following a favorable change in the law." Slip op. at 8. I respectfully disagree.

A defendant who has been sentenced should not have to anticipate a new rule of law and upon that ground fabricate an immediate challenge to a sentence in order to avoid a bar to a belated appeal premised upon fault or a lack of diligence. When the basis for a belated appeal occurs only after the time has run for a notice of appeal within thirty days of the judgment, the belated appellant should not be foreclosed from making a meritorious argument for reversal of the sentence.

Given the circumstance that Newby was entitled to file a petition for belated appeal and the further circumstance that the trial court granted that petition, Newby was entitled to present his Blakely argument. This is because under Smylie v. State, 823 N.E.2d 679, 687 (Ind. 2005), cert. denied, __ U.S. __, 126 S. Ct. 545 (2005), the retroactive application of Blakely is dictated as to all cases "'pending on direct review or not yet final . . . .'" (quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987)) (emphasis supplied). Because under Indiana law, Newby still has available to him a belated appeal under Post-Conviction Rule 2, the judgment in his case was "not yet final." See Fosha v.

State 747 N.E.2d 549, 552 (Ind. 2001); Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005).

I would affirm the decision of the trial court to grant Newby's motion for belated appeal and would address the belated appeal upon its merits.